

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 03-09**

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

Whether the membership fee charged by a Buying Group to enable a participant to purchase products from program suppliers at a discount is subject to Tennessee sales tax.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS¹

A Buying Group business (hereinafter “Buying Group”) charges an annual membership fee to participants who agree to buy from program suppliers a minimum dollar amount equal to 50% of the products and services that they purchase during the year. The membership fee charged ranges from \$500 to \$2,800, depending on the member’s type of business and the package of services to be made available. Payment of the membership fee enables a participating member to make purchases from program suppliers at discounts negotiated by the Buying Group.

In the facts presented, it is stated that the Buying Group acts as a broker between its participating members and the program suppliers and that although the Buying Group’s members have a loosely defined minimum purchase requirement, the substance of the membership fee is to convey the intangible right to buy at a discount. Participants and program suppliers conduct these transactions directly with each other and the membership fee is not netted against the purchases made from the program suppliers.

Regardless of the dollar amount purchased by participating members, the annual membership fee is unchanged and cannot be linked to any specific purchase transaction. In the event that a participating member of the group does not purchase the required

¹ The facts presented with the original ruling request were supplemented in a September 16, 2003 telephone conversation between Arnold B. Clapp, a representative of the Department of Revenue and Charles Parker and Jared Smalling, representatives of Parker, Parker and Stickel.

minimum amount from program suppliers, the member may be barred from making further purchases, or may be asked to leave the Buying Group.

QUESTION PRESENTED

Are the membership fees that the Buying Group charges participants subject to Tennessee sales tax?

RULING

No.

ANALYSIS

The question presented turns on whether the Buying Group is exercising any of the taxable privileges that are subject to Tennessee sales tax². This may be determined by a review of the taxable privileges enumerated in T.C.A. § 67-6-201 as follows:

It is declared to be the legislative intent that every person is exercising a taxable privilege who:

- (1) Engages in the business of selling tangible personal property at retail in this state;
- (2) Uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof;
- (3) Is the recipient of any of the things or services taxable under this chapter;
- (4) Rents or furnishes any of the things or services taxable under this chapter;
- (5) Stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter;
- (6) Leases or rents such property, either as lessor or lessee, within the state of Tennessee;
- (7) Charges admission, dues or fees taxable under this chapter;
- (8) Sells space under this chapter;

² T.C.A. § 67-6-502 states that: "The tax imposed by this chapter shall be collected by the retailer from the consumer insofar as it can be done."

- (9) Charging a fee for subscription to, access to or use of television services provided by a cable television service provider authorized pursuant to title 7, chapter 59, or by a provider of wireless cable television services (multipoint distribution service/multichannel multipoint distribution service) offered for public consumption; or
- (10) Charging a fee for subscription to, access to or use of television services delivered by a provider of direct-to-home satellite service.

Without further analysis, it is axiomatic that the Buying Group's activities do not involve exercise of any of the taxable privileges enumerated in subsections (2), (3), (5), (6), (8), (9) and (10) of T.C.A. § 67-6-201. In the facts presented, it is the suppliers of the Buying Group, rather than the Buying Group itself, that actually sell tangible personal property to the Buying Group's members. Thus, the Buying Group is not exercising the taxable privilege enumerated in subsection (1) of the statute.

With regard to subsection (4) of the statute, it is necessary to review T.C.A. § 67-6-102(a)(25)(F) to determine whether the Buying Group is furnishing any of the taxable services that are subject to sales tax. T.C.A. § 67-6-102(a)(25)(F) makes the following provisions concerning taxable services:

- (F) "Retail sale," "sale at retail" and "retail sales price" include the following services:
 - (i) The sale, rental or charges for any rooms, lodgings, or accommodations furnished to transients by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any place in which rooms, lodgings or accommodations are furnished to transients for a consideration. The tax does not apply, however, to rooms, lodgings, or accommodations supplied to the same person for a period of ninety (90) continuous days or more;
 - (ii) Charges for services rendered by persons operating or conducting a garage, parking lot or other place of business for the purpose of parking or storing motor vehicles. The tax does not apply, however, to charges for such services made by the state and its political subdivisions when providing on-street parking space for which charges are collected, or when operating or conducting a garage or parking lot which is unattended and such charges are collected by parking meters;
 - (iii)(a) The furnishing, for a consideration, of either intrastate or interstate telecommunication services. Except as otherwise provided in subdivision (a)(25)(F)(iii)(b), only those charges for interstate telecommunication which are originated or received in this state and which are billed or charged to a service address in Tennessee shall be included in the tax base;
 - (b) Subject to the provisions of 4 U.S.C. § 116(c), charges for mobile telecommunications services that are subject to taxation under subdivision (a)(25)(F)(iii)(a) shall be deemed to have originated or been received in Tennessee and to be billed or charged to a service address in this state if the customer's place of primary use is located in Tennessee, regardless of where such service actually originates or terminates, and no charges for mobile

- telecommunications services shall be subject to tax if the customer's place of primary use is not located in Tennessee;
- (iv) The performing for a consideration of any repair services with respect to any kind of tangible personal property;
 - (v) The laundering or dry cleaning of any kind of tangible personal property, excluding coin-operated laundry, dry cleaning or car wash facilities, where a charge is made therefor; provided, that the provisions of this subdivision shall not apply to the bathing and grooming of animals until July 1, 1985; and provided further, that notwithstanding any provision of this chapter to the contrary, taxes levied pursuant to this chapter on bathing and grooming of animals shall only be applied to fifteen percent (15%) of the gross charge for such bathing and grooming, but excluding bathing provided by a licensed veterinarian when rendered for a medical purpose in conjunction with the practice of veterinary medicine, as defined in § 63-12-103;
 - (vi) The installing of tangible personal property which remains tangible personal property after installation where a charge is made for such installation, whether or not such installation is made as an incident to the sale thereof, and whether or not any tangible personal property is transferred in conjunction with such installation service;
 - (vii) The enriching of uranium materials, compounds, or products, which is performed on a cost-plus basis or on a "toll enrichment fee" basis;
 - (viii) The renting or providing of space to a dealer or vendor without a permanent location in this state or to persons who are registered for sales tax at other locations in this state but who are making sales at this location on a less than permanent basis. This subdivision (a)(25)(F)(viii) does not apply to the renting or providing of space to a craft fair, antique mall, or book fair or gun show, if such gun show or book fair is sponsored by a not-for-profit corporation. This subdivision (a)(25)(F)(viii) also does not apply to the renting or providing of space at a flea market or the renting or providing of space at conventions, trade shows, or expositions, if such conventions, trade shows, or expositions do not allow the general public to enter the exhibit area for the purpose of making sales or taking orders for sales; and
 - (ix) Charges for warranty or service contracts warranting the repair or maintenance of tangible personal property; provided, that any repairs to the extent covered by the contract shall not also be subject to tax;

Clearly, the Buying Group is not furnishing any of the taxable services enumerated in T.C.A. § 67-6-102(a)(25)(F) to its participating members.

T.C.A. § 67-6-201(7) states that charging taxable admissions, dues or fees constitutes the exercise of a taxable privilege. T.C.A. § 67-6-212 states that the following admissions, dues or fees are taxable:

- (a) There is levied a tax at a rate equal to the rate of tax levied on the sale of tangible personal property at retail by the provisions of § 67-6-202 on the sales price of each sale at retail of the following:
- (1) Dues or fees to membership sports and recreation clubs, including free or complimentary dues or fees, when such are made in connection with a valuable contribution to any such establishment or organization, which shall have the value equivalent to the charge that would otherwise have been made, including any fees paid for the use of facilities or services rendered at a health spa or club or any similar facility or business;
 - (2) Sales of tickets, fees or other charges made for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display or other recreational events or activities, including free or complimentary admissions when made in connection with a valuable contribution to any organization or establishment holding or sponsoring such activities which shall have the value equivalent to the charge that would have otherwise been made;
 - (3) Charges made for the privilege of entering or engaging in any kind of recreational activity, when no admission is charged spectators, such as tennis, racquetball or handball courts; and
 - (4) Charges made for the privilege of using tangible personal property for amusement, sports, entertainment or recreational activities such as trampolines, golf carts, bowling shoes, skates or other sports and athletic equipment.
- (5) Deleted by 1999 Pub.Acts, c. 423, § 2, eff. July 1, 1999.
- (b) Free or complimentary dues or fees which shall have the value equivalent to the charge that would have otherwise been made shall be taxed under the provisions of this section, unless such free or complimentary dues or fees are provided to persons who attend a public school or public college or university.
 - (c) The provisions of this section shall not be construed to levy a tax on any sale or transfer of any interest in real property, regardless of whether or not such property is used for amusement or recreational purposes. The provisions of this section shall not be construed to levy a tax on any sale or transfer of any ownership interest in tangible personal property, regardless of whether or not such property is used for amusement or recreational purposes.
 - (d) The provisions of this section taxing charges for admission shall be construed to include all charges whatsoever made for admission to professional sporting events, including any charge for a seat license, skybox, luxury suite, or any other accommodation for spectators, whether styled as a license, lease, rental or otherwise.

While it is true that the Buying Group does charge what may be described as admissions, fees or dues, none of these charges are among the taxable admissions, fees and dues set forth in T.C.A. § 67-6-212.

Having examined all statutes relevant to the question and the issues presented, it appears that the Buying Group is rendering a nontaxable service and thus has no obligation to collect Tennessee sales tax on the membership fees that it charges its participating members.

This conclusion is further supported by a decision of the Tennessee Court of Appeals in *Barnes & Noble Superstores, Inc., d/b/a Bookstar v. Huddleston*, WL 596955 (Tenn. Ct. App. 1996).

In *Barnes & Noble*, Bookstar sold “Reader’s Choice” discount cards to its customers for a \$10 annual membership fee. Customers who purchased such cards were entitled to a 10% membership discount when purchasing merchandise in all Bookstar stores. The Court of Appeals held that Bookstar’s sale of discount club memberships was not subject to Tennessee sales tax because the true object of paying the \$10 fee was to obtain the intangible privilege of receiving a discount on merchandise purchased and such a fee is not subject to sales tax under applicable statutes.

While there are some differences in the factual situation presented for purposes of this Revenue Ruling and the factual situation in *Barnes & Noble*, it is apparent that there is neither statutory law nor case law to support subjecting the sale of an intangible right to a discount to the Tennessee sales tax.

Arnold B. Clapp
Special Counsel to the Commissioner

APPROVED: Loren L. Chumley, Commissioner

DATE: 10/7/03